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In The

Supreme Court of the United States

October Term, 1990

COMMISSIONER OF REVENUE SERVICES
OF THE STATE OF CONNECTICUT,

Petitioner,

v.

SFA FOLIO COLLECTIONS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE, STATE OF CALIFORNIA

The State of California, on behalf of the California State Board of Equalization, submits this brief as amicus curiae in support of petitioner, Commissioner of Revenue Services of the State of Connecticut. Since this brief is being filed by the State of California and is sponsored by the California Attorney General, consent to its filing is not required. United States Supreme Court Rule 37.5.

At issue in this case is whether Connecticut can, consistent with the Due Process and Commerce Clauses, require out-of-state mail order companies to collect use taxes from that state's customers in situations where the companies conduct substantial and recurring solicitations and sales in the state.

In addition to the state court actions referenced by petitioner,[1] California is presently involved in four separate actions, two in federal district court,[2] two in California state courts,[3] each of which involve this same issue

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[1] Petition at pages 7 and 12.

[2] *Direct Marketing Association v. William M. Bennett, et al.*, CV-S-88-1067-MLS, (E.D. Cal.); *Olde Salmon Falls Corp. v. William M. Bennett, et al.*, CIVS-91-306 EJG-JFM (E.D. Cal.). In the former case, the district court ruled that plaintiff trade association has standing so that the application of plaintiff to enjoin California from enforcing its use tax enforcement statute, section 6203(f), California Revenue & Taxation Code, is proceeding to judgment. The latter case, recently filed, seeks a judicial determination that, based upon this same statute, California cannot constitutionally require plaintiff to collect and remit California use taxes. Section 6203(f) contains explicit guidelines for the enforcement of use tax collection duties of out-of-state mail order sellers.

[3] *Lands' End, Inc. v. California State Board of Equalization*, No. 620135, Superior Court of California, San Diego County (appeal pending); *Sturbridge Yankee Workshop, Inc. v. State Board of Equalization*, No. 512584, Superior Court of California, Sacramento County (California expects that the notice of appeal in this matter will be filed within a matter of days). In both cases, the trial courts ruled that each plaintiff has insufficient "nexus" with California to constitutionally permit assertion of the state's use tax collection requirement predicated on section 6203(f), California Revenue & Taxation Code.

and are presently in varying procedural postures.[4]

This case presents the Court with the opportunity to address the significant technological changes utilized by mail order companies since this Court's decision in *National Bellas Hess v. Department of Revenue,* 386 U.S. 753 (1967), to consider the "economic realities" of the substantial exploitation of local markets by such entities, and to provide guidance in resolving the numerous pending federal and state cases by announcing the legal standard applicable to the efforts (including legislative enactments) of many states to require such entities to collect and remit use taxes.

SUMMARY OF ARGUMENT

The mail order industry no longer involves twice-a-year catalogs supplemented by occasional mailings and customer contacts limited to common carriers and the postal service, while as many as 2,300 jurisdictions, with varying rates, attempt to assess use taxes (*National Bellas Hess, supra,* at 754-55, 759). Mail order retailers now exploit local markets through the use of "800" telephone numbers (some available 24 hours every day), through voluminous catalog mailings and through the acceptance

[4] Additionally, the *Direct Marketing Association v. William M. Bennett, et al.* matter has this term been the subject of a certiorari petition by California (Case No. 90-1400) which sought this Court's review of the Ninth Circuit's application of the Tax Injunction Act (28 U.S.C. § 1341) to California's use tax claim and refund statutes. This Court denied the petition.

of credit cards for purchases. Those credit card systems permit the mail order company to be electronically and almost instantaneously advised whether the financial institution which issued the card approves the purchase and thus, in effect, guarantees payment to the seller. At the same time, states such as California have limited the mail order companies' use tax collection requirement to a single uniform statewide rate,[5] so that the impediments to interstate commerce envisioned by this Court in *National Bellas Hess* (*supra*, at 759) are no longer a reality. The rationale no longer exists to permit mail order companies to ignore a state's use tax collection requirements at the same time substantial sales are made in the same state.

ARGUMENT

I. THE VOLUME AND METHODS OF MAIL ORDER BUSINESS FAR EXCEED THAT BEFORE THE COURT IN *NATIONAL BELLAS HESS.*

The mail order company in *National Bellas Hess* utilized twice-a-year catalog mailings supplemented by occasional advertising "flyers" and mail and/or common carrier customer contacts, which resulted in an unspecified amount of sales in that state. (*Id.*, at 754-55.)[6] Cali-

[5] Section 6203(j), California Revenue & Taxation Code.

[6] The dissenting opinion referenced sales figures but the same were not mentioned by this Court in its decision.

fornia agrees with Connecticut[7] that now the methods utilized by mail order companies to conduct local business are far different and permit substantial sales in a single state.

For example, in the *Lands' End* matter (fn. 3, *supra*), the parties stipulated that: 1) in (fiscal) 1989, Lands' End had 13 catalog issues with an average of 156 pages per issue involving the mailing of approximately 75 million catalogs; 2) in calendar 1989, Lands' End's California sales exceeded $63,000,000 with total sales in excess of $543,000,000; 3) that for 90 to 95 percent of the shipments of goods to California customers, two to three times a week truck trailers owned by another company are loaded with packages at Lands' End's distribution center and the trailers deliver these packages to a United Parcel Service facility in Los Angeles for ultimate delivery to customers; 4) that 600 "800" telephone lines (involving no cost to customers for any calls) for customer orders are available 24 hours every day except Christmas; and 5) that 86 per cent of Lands' End's sales are made through acceptance of a customer's credit card, with a substantial portion of such sales to California customers effectuated through acceptance of credit cards issued by California financial institutions.[8]

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[7] Petition, at 10–13.

[8] While the particulars of the business practices of other mail order companies may not exactly parallel those of Lands' End, California understands that significant and continuing catalog solicitations, "800" lines, and a high percentage of sales by credit card are the norm for mail order companies.

The acceptance of credit cards is among the most important methods through which mail order companies now conduct business.

In *Colorado Springs National Bank v. United States,* 505 F.2d 1185 (10th Cir. 1974), the Court of Appeals engaged in an extended discussion of the mechanics of credit card transactions.[9] As that court noted, utilizing even the technology and computers available by 1974, the merchant, by honoring the credit card, is paid, at a discount, by the bank which issued the card, with the card user liable to the issuing bank. (*Id.,* at 1190.)

California has learned, through discovery in cases including *Lands' End, supra,* that mail order retailers are provided by their own credit card merchant banks[10] with electronic equipment permitting retailers to be electronically and almost instantaneously advised whether the bank which issued the credit card will approve the purchase. Mail order merchants who obtain such electronic purchase authorizations record that the approval was obtained, provide the merchant banks with the approval information, and thus insure that payment, at a discount, will be forthcoming, with the card-issuing bank liable for collecting the debt from the card holder. In fact, since validly obtaining approval authorization insures payment

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[9] The legal issue addressed was the deductibility of expenses associated with credit card start-up costs.

[10] These are the banks to which mail order companies submit approved credit card charges for payment, so that the transactions are processed through the credit card systems and ultimately billed to the customer's account.

to the seller for credit card sales, the practice of the industry is to decline credit card sales where the issuing bank, or an entity authorized to act on behalf of the bank, has not given the electronic approval.

II. THE RATIONALE NO LONGER EXISTS FOR EXEMPTING MAIL ORDER COMPANIES FROM COLLECTING STATE USE TAXES ABSENT SUCH COMPANIES HAVING PHYSICAL PRESENCE IN THE TAXING STATE.

The potential "welter of complicated obligations to local jurisdictions with no legitimate claim" to make mail order retailers collect use taxes (*National Bellas Hess, supra,* at 760), previously relied upon by this Court to strike down Illinois' effort to require a mail order company to collect that state's use taxes, is no longer a problem, particularly as to California and other states which limit use tax collection requirements to a single statewide rate. (See California Revenue & Taxation Code, section 6203(j).) Claims of undue burden, even assuming *arguendo* that a number of jurisdictions in any other state could assert a use tax collection obligation as to any particular mail order retailer, appear frivolous in the face of the reliance of modern business on computers and similar equipment. This is especially true considering the utilization by mail order companies of the national credit card systems involving the electronic authorization process which is employed for every single credit card transaction.

To the extent the "physical presence" standard for permitting a state to assert a use tax collection requirement (*National Bellas Hess, supra,* at 758) retains any validity, it is important to note that this Court's reference to "retail

outlets, solicitors, or property within a state" was contrasted with companies which "do no more than communicate with customers in the State by mail or common carrier." However, mail order companies now participate, without the involvement of mail or common carriers, in national credit card systems, which can (and do) involve substantial connections with the state asserting a use tax collection duty. For example, to the extent that the banks which issue the credit cards maintain such accounts and provide approval authorization, are situated and perform such functions in the same state where the customer lives, these activities involve substantial business being conducted in that state, business in which the mail order companies participate. In the circumstances involving such credit card transactions, certainly the activities in the state asserting the use tax collection requirement far exceeds that of the 10 solicitors who worked in Florida and whose activities were found sufficient to require use tax collection by this Court in *Scripto, Inc. v. Carson,* 362 U.S. 207, 211-12 (1960).

CONCLUSION

For the reasons stated, this Court should address the constitutionality of the states' use tax collection requirements in the context of how the mail order companies now conduct business (including utilization of the credit card systems) and how such business permits substantial exploitation of local markets making collection of use taxes absent any constitutionally infirm burden.

Respectfully submitted,

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California Revenue & Taxation Code, Section 6203

§ 6203. Collection of tax by retailer; Receipt to purchaser; "Retailer engaged in business in this State"

Except as provided by Sections 6292 and 6293, every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state, not exempted under Chapter 3.5 (commencing with Section 6271) or Chapter 4 (commencing with Section 6351), shall at the time of making the sales or, if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt for the tax in the manner and form prescribed by the board.

As respects leases constituting sales of tangible personal property, the tax shall be collected from the lessee at the time accounts are paid by the lessee under the lease.

"Retailer engaged in business in this state," as used in this section and in Section 6202, means and includes any of the following:

(a) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business.

(b) Any retailer having any representative, agent, salesperson, canvasser, or solicitor operating in this state under the authority of the retailer or its subsidiary for the

purpose of selling, delivering, or the taking of orders for any tangible personal property.

(c) As respects a lease, any retailer deriving rentals from a lease of tangible personal property situated in this state.

(d) Any retailer soliciting orders for tangible personal property by means of a telecommunication or television shopping system (which utilizes toll free numbers) which is intended by the retailer to be broadcast by cable television or other means of broadcasting, to consumers located in this state.

(e) Any retailer who, pursuant to a contract with a broadcaster or publisher located in this state, solicits orders for tangible personal property by means of advertising which is disseminated primarily to consumers located in this state and only secondarily to bordering jurisdictions.

(f) Any retailer soliciting orders for tangible personal property by mail if the solicitations are substantial and recurring and if the retailer benefits from any banking, financing, debt collection, telecommunication, or marketing activities occurring in this state or benefits from the location in this state of authorized installation, servicing, or repair facilities.

(g) Any retailer owned or controlled by the same interests which own or control any retailer engaged in businesses in the same or similar line of business in this state.

(h) Any retailer having a franchisee or licensee operating under its trade name if the franchisee or licensee is required to collect the tax under this section.

(i) Any retailer who, pursuant to a contract with a cable television operator located in this state, solicits orders for tangible personal property by means of advertising which is transmitted or distributed over a cable television system in this state.

(j) Notwithstanding Section 7262, a retailer specified in subdivision (d), (e), (f), (g), (h), or (i) above, and not specified in subdivision (a), (b), or (c) above, is a "retailer engaged in business in this State" for the purposes of this part and Part 1.5 (commencing with section 7200) only.